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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 387

MARK GANNON, *Petitioner*

v.

W. R. BRITTON, *Respondent*

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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To the Honorable Supreme Court of the United States:

1. Your respondent, W. R. Britton, in this opposition to the granting the writ of certiorari prayed for, will not attempt herein to reply at this time to the extensive brief on the merits filed by petitioner. Should the petition be granted, respondent will file proper brief seriously opposing the contentions of petitioner in his presentation of the merits of his case on appeal. But to state briefly regarding the merits of petitioner's case, as shown in his brief, that this is not the type of case usually considered by the Supreme Court; there is no question of public interest involved, and petitioner has full access to the highest court in his State.

2. STATEMENT OF THE CASE

The facts here stated relate to the one point, that the judgment petitioner seeks to have the Supreme Court review is not a "Final Judgment or Decree" (U.S.Code, Title 28, Sec. 1257), and to Rules 19 and 20 of the Rules of the Supreme Court of the United States.

On the 21st day of February, 1952, Mark Gannon as plaintiff filed a petition in the District Court of Pontotoc County, Oklahoma, against W. R. Britton, defendant in Action No. 20,262. Pleadings and amendments to pleadings were filed by both parties, records, evidence, and proffered evidence were heard by the trial court without a jury, and on the 4th day of May, 1953, the trial judge, John Boyce McKeel, entered a finding and judgment for plaintiff. (Petitioner's Appendix page xi, and page lxxviii).

From this judgment defendant, W. R. Britton, appealed to the Supreme Court of Oklahoma. Extensive arguments and briefs setting forth the legal contentions of the parties were had (see petitioner's appendix) and after consideration the Supreme Court of Oklahoma, said:

"The trial court erred in refusing the proffered evidence of extrinsic fraud. Reversed and remanded for a new trial." (Petitioner's appendix, pages 1 to vi).

By this order of the Oklahoma Supreme Court the case was sent back to Pontotoc County District Court, for a new trial. The testimony proffered by defendant, W. R. Britton, was made competent on a retrial of the case de novo.

3. ARGUMENT AND CITATION OF AUTHORITIES:

"The court remanded the cause for trial, not for dismissal. The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute. 28 U.S.C.A., sec. 1257 (3)" (citing cases under note 10). "As its judgment upon the first writ was merely for a reversal of the court below, and for a trial, such judgment, not being final, could not be made the subject of a writ from this court." United States v. Denver & R.G.R. Co., 191 U.S. 83, 93, 24 S.Ct. 33, 36, 48 L.Ed. 106. See Coe v. Armour Fertilizer Works, 237 U.S. 413-418-449, 35 S.Ct. 625-627, 59 L.Ed. 1027, Gospel Army v. City of Los Angeles, 331 U.S. 543, 67 S.Ct. 1428, 91 L.Ed. 1662, and authorities cited."

The above is quoted from Urie v. Thompson, 337 U.S. 163, 171, 69 S.Ct. 1018, 1025, 11 A.L.R. 2d 252.

It appears that the authorities are uniform in holding that where the Supreme Court of a State reverses a case and remands it to the trial court for a new trial that the action of the State supreme court is not a *final judgment* entitling the losing party to petition for a writ of certiorari by the Supreme Court.

In 97 L. Ed. in a note at page 212, it is said:

"As stated in the earlier annotation, a judgment or decree of the highest court of a state, reversing an inferior court and remanding the cause to the lower court for a new trial is not a final judgment, and hence not reviewable by the federal Supreme Court. This rule is also supported by Urie v. Thompson (1949) 337 U.S. 163." Supplemental annotation on the same point is found in 97 L.Ed. at 1186. Volume 16 of Words and Phrases, pages 749 to 754 under "Reversed or Remanded" cites many cases in point. On page 753: "A judgment of an appellate court reversing the judgment of the trial court and remanding the cause for further proceedings is not a final judgment, as that term is used in federal appellate proce-

dure." (citing many federal cases). "a judgment reversing that of an inferior court and awarding a new trial is not a final judgment. Houston v. Moore, 16 U.S. (3 Wheat. 433, 4 L.Ed. 428. No judgment is final which does not terminate the litigation between the parties. A judgment reversing the judgment of an inferior court, and remanding the cause, is not a final judgment. St. Claire County v. Lovingston, 85 U.S. (18 Wall.) 628, 21 L.Ed. 813, Winn's heirs v. Jackson 25 U.S. (12 Wheat) 135, 6 L. Ed. 577." See also Great Western Tel. Co. v. Burnham, 162 U.S. 339, 16 S. Ct. 850, 851.

CONCLUSION

So far as we have been able to find a State supreme Court's judgment reversing a case and remanding it to the trial court for a new trial is not a final judgment in contemplation of United States Code, Title 28, sec. 1257. Since a writ of certiorari may be granted to review a final judgment only the petitioner in this case has no foundation on which to ask the Supreme Court to grant him the writ prayed for, and therefore he must fail. The respondent respectfully submits that the petition should be denied.

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